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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1734

W. M. GURLEY, D/B/A GURLEY OIL COMPANY,

Petitioner

versus

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,

Respondent

BRIEF FOR THE RESPONDENT

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No. 73-1734

W. M. GURLEY, D/B/A GURLEY
OIL COMPANY,

Petitioner

versus

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,

Respondent

BRIEF FOR THE RESPONDENT

The Respondent, Arny Rhoden, Commissioner, Chairman of the State Tax Commission for the State of Mississippi, respectfully submits that the Petitioner's prayer for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Mississippi entered in this proceeding on January 28, 1974, should be denied.

OPINIONS BELOW

The opinions by the Chancery Court of the First Judicial District of Hinds County, Mississippi, and the Supreme Court of the State of Mississippi, in this matter are adequately set forth by reference in appendices A and B of the Petition submitted herein.

JURISDICTION

The statement of jurisdiction of this matter is adequately set forth in the Petition filed herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitution and statutory provisions set forth by Petitioner, additional pertinent statutory provisions are Miss. Code Ann. Section 27-65-13 (1972), Miss. Code Ann. Section 27-65-17 (1972), Miss. Code Ann. Section 27-65-3 (g) (1972), Miss. Code Ann. Section 27-65-29 (e) (1972) and Miss. Code Ann. Section 27-55-11 (1972).

Statutory provisions:

1. Miss. Code Ann. Section 27-65-13 (1972) provides as follows:

> There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

2. Miss. Code Ann. Section 27-65-17 (1972) provides as follows:

> Upon every person engaging or continuing within this state in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed and shall be collected a tax equal to five per cent of the gross proceeds of the retail sales of the business, except as otherwise provided herein . . .

> Wholesale sales of beer, motor fuel, soft drinks and syrup shall be taxed at the rate of five per cent in lieu of the one-eighth of one per cent wholesale tax, and the retailer shall file a return and compute the retail tax on retail sales, but may take credit for the amount of the tax paid to the wholesaler on said return covering the subsequent sales of same property, provided adequate invoices and records are maintained to substantiate the credit.

3. Miss. Code Ann. Section 27-65-3 (g) (1972) provides as follows:

> Gross proceeds of sales means the value proceeding or accruing from the full sale price of tangible personal property including installation charges, carrying charges, or any other additions to selling price on account of deferred payments by purchaser, without any deductions for freight, cost of property sold, other expenses or losses, or taxes of any kind except those expressly exempt by Miss. Code Ann. Section 27-65-29 (1972).

4. Miss. Code Ann. Section 27-65-29 (1972) provides as follows:

> The tax levied by this chapter shall not apply to the following:
>
> (e) Taxes
>
> (1) Federal retailers' excise taxes, federal tax levied on income from transportation, telegraphic dispatches, telephone conversation and electric energy.
>
> (2) The State of Mississippi gasoline tax on gasoline sold by a distributor for nonhighway use

which is refunded by the Motor Vehicle Comptroller.

5. Miss. Code Ann. Section 27-55-11 (1972) provides as follows:

> Any person in business as a distributor of gasoline, or who acts as a distributor of gasoline, as defined in this article, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to eight cents per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this state or received in this state for sale, use on the highways, storage, distribution, or for any purpose.
>
> With respect to distributors or other persons who bring, ship, have transported, or have brought into this state gasoline by means other than through a common carrier, the tax accrues and the tax liability attaches on the distributor or other person for each gallon of gasoline brought into the state at the time when and at the point where such gasoline is brought into the state.

QUESTIONS PRESENTED

1. Whether Excise Taxes imposed by 26 U. S. C. Section 4081 and Miss. Code Ann. Section 27-55-11 (1972) may be included in the sales tax base utilized by the State of Mississippi in computing taxable "gross proceeds of sales"?

2. Respondent would accept question No. 2 posed by Petitioner.

3. Respondent would accept question No. 3 posed by Petitioner.

STATEMENT OF THE CASE

Petitioner Gurley is in the business of importing, distributing and retailing gasoline, diesel fuel and related petroleum products, with principal offices in West Memphis, Arkansas, ownership of five retail service stations in Mississippi, and consignment sales operations through several Mississippi grocery stores. Petitioner obtained Mississippi Distributor's Permit No. 447 for gasoline, diesel fuel, kerosene or oil, and posted the necessary bond conditioned upon the full payment of all excise taxes levied on those fuels pursuant to Chapter 64, Mississippi Laws of 1946, as amended. Petitioner is likewise qualified as a distributor of gasoline with, and pays federal excise tax to, the Internal Revenue Service. During the period pertaining to this Petition, and pursuant to the authority of the permits and bonds described, Petitioner purchased gasoline and fuel from producers in Arkansas and Tennessee and distributed that fuel for sale at Mississippi outlets.

On January 16, 1971, Petitioner filed suit to recover sales taxes in the amount of Sixty Two Thousand Seven Hundred Eighty Two Dollars and Fifty Seven Cents ($62,782.57) which he alleged were improperly collected by the State of Mississippi. The basis of Petitioner's complaint was that the sales taxes were computed on a tax base which included State and Federal Excise taxes in addition to the base price of gasoline. Respondent herein cross-complained for sales taxes not paid by Petitioner and the Respondent prevailed in both the Mississippi lower Court and the Mississippi Supreme Court. In the subject proceeding, Petitioner has requested the United States Supreme Court to grant certiorari to consider constitutional questions which he has raised and to reverse the decision of the Mississippi Supreme Court.

ARGUMENT

POINT 1

UNITED STATES AND MISSISSIPPI EXCISE TAXES ARE BY DEFINITION AND STATUTE IMPOSED ON THE DISTRIBUTOR NOT THE CONSUMER.

Courts have used many various definitions for the meaning of the word excise, as an adjective to describe a tax. It is submitted that by most such definitions excise taxes such as the ones in question are legally imposed upon the seller or distributor. The following quoted definitions from two earlier Federal decisions, among others, so indicate:

> "An impost for a license to pursue certain callings or to deal in special commodities or to exercise particular franchises." *East Ohio Gas Company v. Tax Commission of Ohio*, 43 F. 2d 170, 172 (DC Ohio 1930).

> "The terms excise tax and privilege tax are synonymous." *American Airways, Inc. v. Wallace*, 57 F. 2d 877, 880 (DC Tennessee 1932).

The Federal Gasoline Excise Tax is found in Title 26, Chapter 32, *United States Code*, Section 4081 et seq. entitled "Manufacturers Excise Taxes". Section 4081(a) provides as follows:

> "There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ a gallon."

A "producer" for the purposes of the Federal Excise Tax is expressly defined in Title 26, *U. S. Code*, Section 4082(a) as follows:

> "Producer. As used in this subpart, the term 'producer' includes a refiner, compounder, blender or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer. Any person to whom gasoline is sold tax-free under this subpart shall be considered the producer of such gasoline."

A cursory examination of the federal statute discloses that no reference is made therein to the ultimate retail purchaser or consumer of the product taxed. The levy attaches upon the sale by the producer, manufacturer or importer of the gasoline, and not upon its sale to the ultimate consumer.

In this case it is unnecessary and inappropriate to resort to any extraneous guidelines for the interpretation of the statute for the language of the statute is clear and unambiguous in its terms.

With respect to the Federal Excise Tax, the question of legislative intent was discussed at length by the Illinois Supreme Court in *Martin Oil Service, Inc. v. Illinois Department of Revenue*, 49 Ill. 2d 260, 273 NE 2d 823, Cert. denied 405 US 923 (1971):

> "It is urged by Martin that certain congressional references to the gasoline tax show it must be considered a tax whose incidence rests on the consumer. Exemplary of these is the President's Message to Congress May 17, 1965, Report of the House Ways and Means Committee on H. B. 8371 89th Congress First Session (1965) at 1070-71, in which President Johnson said: 'reform of the excise tax structure will lease * * * excises on alcoholic beverages, tobacco, gasoline, tires, trucks, air transportation (and a few other user charges and special excises) * * *.' (H. R. Doc. No. 173, 89th Cong., 1st Sess. 3 (1965).) We

consider the references to the tax as a 'user tax' were not intended to be descriptive of the legal incidence of the gasoline tax. It is not disputed that the ultimate economic burden of the tax rests upon the purchaser-consumer. A practical nontechnical description of the tax as a 'user tax' is explainable, consistently with the legal incidence of the tax being on the producer. The economic burden of the tax has no relevance to the issue before us. *Fischman & Sons, Inc. v. Department of Revenue*, 12 Ill, 2d 253.

So far as the Federal legislative intendment is concerned it is relevant to notice that a reference of greater and persuasive significance to the incidence of the tax is found in Senate Report No. 367, a report of the Committee of Finance relative to the Federal-Aid Highway Act of 1961. (U. S. Code Congressional and Administrative News. vol. 2, 87th Congress, 1st Session, 1961.) The report, which contains a recommendation by the committee that the gasoline tax be continued at the rate of four cents per gallon, states: 'Under present law the Federal tax on gasoline is imposed on the producer, importer or wholesaler distributor of the gasoline and is payable shortly after he makes its sale.' "

With respect to the Mississippi gasoline excise statute, it is apparent that its language makes it a tax upon the producer (distributor) and not a tax upon the consumer.

Section 27-55-11 of the *Mississippi Code of 1972* reads as follows:

> Any person in business as a distributor of gasoline, or who acts as a distributor of gasoline, as defined in this article, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to eight cents per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this state or received in this state for sale, use on the highways, storage, distribution, or for any purpose. . .
>
> With respect to distributors or other persons who bring, ship, have transported, or have brought into this state gasoline by means other than through a common carrier, the tax accrues and the tax liability attaches on the distributor or other person for each gallon of gasoline brought into the state at the time when and at the point where such gasoline is brought into the state.

Many cases holding that such excise taxes are not includable in the price base for state sales taxes are based upon the fact that some state statutes expressly provide for the tax to be passed along to the ultimate user of the fuel. Obviously, no such provision exist in the Mississippi law and while the distributor on whom the incidences of the tax rests, may pass on the tax when he sells the gasoline, he is certainly not legally required to do so. In fact, as shown by the testimony in the trial court in this cause of Joe Sharp, the State Official charged with the duty of administering and collecting these taxes, tax liability attaches to the distributor or importer at the time the gasoline enters the State of Mississippi. It is immaterial to Mississippi whether, after paying the tax, the distributor sells the gasoline, gives it away, pours it on the ground, or sells it to a retailer or directly to an ultimate consumer. (Tr. Rec. pp. 177-180, 187).

In fact, on January 1, 1970, an amendment became effective by which the provision in the Mississippi statute that had theretofore permitted a gasoline distributor to

pass along the tax when he sold the gasoline was removed from the law.

POINT 2

THE LEGAL INCIDENCE OF THE GASOLINE EXCISE TAXES IMPOSED BY 26 U. S. C. SECTION 4081 AND MISS. CODE ANN. SECTION 27-55-11 (1972) HAS BEEN CONSTRUED BY FEDERAL AND STATE COURTS TO FALL ON THE DISTRIBUTOR.

Several jurisdictions have considered the question and have determined the legal incidence of the federal gasoline excise tax. Pennsylvania in *Tax Review Board vs. Esso Standard Division of Humble Oil & Refining Company*, 424 Pa. 335, 227 A.2d 657, cited *Panhandle Oil Co. vs. State of Mississippi ex rel. knox*, 277 U.S. 218 48 S.Ct. 451, 72 L. Ed. 857 (1928) and *Indian Motorcycle Company vs. United States*, 283 U.S. 570, 51 S. Ct. 601, 15 L. Ed. 1277 (1931) and found that the legal incidence of the tax was on the purchaser-consumer. Despite the Pennsylvania Court's reading of those cases, in view of the case of *Alabama vs. King and Boozer*, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 1 (1941), later federal decisions have read the *Pan handle* and *Indian Motorcycle* cases differently, as is indicated by the following language:

> [with reference to the *Indian Motorcycle* case] . . . The Court did not, of course, decide that the purchaser was the tax payer. It only made a liberal application of the doctrine of federal immunity from State tax. And in *Alabama vs. King and Boozer* (citations omitted), the Supreme Court overruled *Panhandle*, the precedent upon which the *Indian Motorcycle* decision was based, and held that, even in the application of the immunity of the Federal Government from State taxation, the "incidence" of the tax and not the place where the economic burden of the tax ultimately rested was the important thing. (P. 749) *Dow Jones & Company vs. United States*, 128 F. Supp. 748 (1955).

In the case of *Martin's Auto Trimming, Inc. vs. Riddell*, 283 F.2d 503 (1960), where the Plaintiff was seeking to obtain a return of manufacturing taxes which were later passed on to consumers, the Court said:

> Appellants main reliance is placed on *Indian Motorcycle Company v. United States*, 283 U.S. 570, 51 S. Ct. 601, 15 L. Ed. 1277 (1931), Standard Oil v. United States, 130 F. Supp. 821 . . . .
>
> It is obvious the Appellant has misread the effect of the decisions in these cases. None of these cases hold that the excise tax is imposed upon the purchaser. All of those cases hold that the tax is the obligation of the manufacturer when the product is sold. The excise tax in question on this appeal is the tax which was imposed upon sales by Appellant during the period mentioned. (P. 505)

A majority of the jurisdictions considering the question have concluded that legal incidence of the excise tax is on the distributor and therefore, includable in the base for sales tax. *Sun Oil Company v. Gross Income Tax Division*, 238 Ind. 111, 149 N.E. 2d 115 (Ind. S. Ct.): *State of Georgia v. Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S.E. 2d 224, affirmed by the Georgia Appellant Court in 226 Ga. 883, 178 S.E. 2d 173, and *Martin Oil Service, Inc. v. Department of Revenue*, 49 Ill. 2d 260, 273 N.E. 2d 823 (Ill. S. Ct., Sept. 30, 1971) Cert. denied by United States Supreme Court in Docket No.

71-845, February 22, 1972. *Pure Oil Company v. State of Alabama*, 244 Ala. 258, 12 So. 2d 861, 148 ALR 260.

The cases of *Standard Oil Company v. State Tax Commissioner of North Dakota*, 71 N.D. 176, 299 N.W. 447, 135 ALR 1481, and *Standard Oil v. State of Michigan*, 283 Mich. 85, 276 N.W. 908, did not consider or determine the question of the legal incidence of the federal tax. These cases were decided on the rationale that because liability for the federal tax accrued only upon sale *by* a producer, and because under the Michigan and North Dakota sales tax acts, the sales tax liability likewise accrued at the time of that sale, the federal tax could not be included as part of the sales tax base in those states.

We believe the latest, soundest, and most complete decision on the precise issues presented here is that of *Martin Oil Service, Inc. v. Illinois Department of Revenue*, Supra, decided by the Illinois Supreme Court on September 30, 1971, and on which certiorari was denied by the United States Supreme Court on February 22, 1972. 405 U.S. 923, 30 L.Ed. 2d 794, 92 S. Ct. 691, 49 Ill. 2d 260, 273 N.E. 2d 823. There, Martin operated two wholesale and 43 retail gasoline outlets in Illinois. He was licensed by the United States for payment of the federal excise tax, just as Gurley is licensed for that purpose in this case. He contended that the federal gasoline tax should not be included in gross receipts for the purpose of computing the Illinois Retailers Occupation Tax, which corresponds to Mississippi's sales tax, alleging that the legal incidence of the federal tax was on the consumer-purchaser. In disposing of this contention, the Illinois Supreme Court very cogently stated as follows:

"This question appeared before this Court in

1936, when in *People v. Werner*, 364 Ill. 594, it was said that the legal incidence of the Federal gasoline tax rested on the producer. Martin, to avoid the force of *Werner*, argues that the legal incidence of the tax was there stipulated by the parties. It is true that *Werner* was decided on a stipulation of facts. We cannot find however, any suggestion that the question of the legal incidence of the tax was part of the stipulation. Rather it seems clear that this Court's expression that the legal incidence of the tax rests on the producer was based on its analysis of the Federal statute.

As Martin points out at least one jurisdiction has taken a position opposed to *Werner*. The Supreme Court of Pennsylvania in *Tax Review Board vs. Esso Standard Division of Humble Oil and Refining Co.*, 424 Pa. 335, 227 A. 2d 657, cert. denied, 389 U.S. 824, 19 L.Ed. 79 held that the legal incidence of the tax is on the purchaser-consumer. Decisions of two other States are read by Martin as supporting its thesis that the tax incidence is on the purchaser-consumer. It was held in *Standard Oil vs. State* (1937), 283 Mich. 85, 276 N. W. 908, and *Standard Oil Co. vs. State Tax Commissioner* (1941), 71 N. D. 146, 299 N. W. 447, that on sales from producer retailers to consumers the Federal gasoline and State sales taxes were taxes that were to be simultaneously imposed. Those Courts concluded from this that the Federal tax should not be included in the "gross receipts" for the purpose of computing the State tax. Neither case considered the question of on whom the legal incidence of the Federal tax falls. We would observe that other Courts have reached the same conclusion this Court did in *Werner*. It was held in *Sun Oil Co. v. Gross Income Tax Division*, 238 Ind. 111, 149 N. E. 2d 115, by the Supreme Court of Indiana and in *State vs. Thoni Oil Magic Benzol Gas Stations*,

Inc., 121 Ga. App. 454, 174 S. E. 2d 224, aff'd 226 Ga. 883, 178 S. E. 2d 173, by the appellate court of Georgia that the legal incidence of the Federal tax rests upon the producer. The Supreme Court of Indiana relied importantly on *People vs. Werner*, in its determination. We consider after reviewing these cases that *Werner* correctly judged that the incidence rests on the producer. The validity of this view can be illustrated by the consideration that if the tax is not paid by the producer, he is the only one from whom the government may seek to collect the tax. Significantly the statute does not impose any liability on the purchaser-consumer if the gasoline tax is not remitted by the producer. It is irreconcilable to say that the legal incidence of the tax is on the consumer-purchaser and to say that he is not liable for the tax. Referring to our decision in *American Oil Co. vs. Mahin*, No. 43376, where we held that the incidence of the Illinois Motor Fuel Tax is on the consumer, we note that the statute there examined provides that the tax may be recovered from the consumer-purchaser if it has not been collected by the retailer.

Martin then contended as does Gurley in the instant case that because certain consumers of gasoline can secure refunds or credit for gasoline tax paid, the incidence of the tax was upon the consumer-purchaser rather than upon the producer-distributor. The Illinois Court disposed of this contention as follows:

> Another contention of Martin is that because amendments to the gasoline statute provide that certain consumers of gasoline can secure refunds of the gasoline tax paid, it must have been the legislative intent that the consumer-purchaser would bear the legal incidence of the tax. It is pointed out that in *Chicago Motor Club vs. Kinney*

329 Ill. 120, the Court said that a tax refund to a person who has not directly or indirectly paid the tax would be unconstitutional, and thus, Martin argues, as certain consumers can secure a refund, the incidence of the tax must be on the consumer-purchaser.

We consider that the argument has only superficial validity when measured against the very convincing evidence of a contrary legislative intention, including the statement of the Committee on Finance that the Federal gasoline tax was imposed "on the producer, importer, or wholesale distributor of the gasoline". The amendments upon which Martin relies provide that the purchaser-consumer can obtain payment in full of the Federal gasoline tax, that is, four cents per gallon, if the gasoline has been used on a farm for farming purposes (26 U. S. C. Sec. 6420 (a)) and half of the tax payment, that is, two cents a gallon, if the gasoline has been used for other non-highway purposes (26 U. S. C. Sec. 6421 (a)) or by the local transit systems (26 U. S. C. Sec. 6421(b)).

> We consider that these payments by the Federal government are not refunds in a technical sense but rather allowances to certain consumer-purchasers based on a recognition that the economic burden of the gasoline tax falls on the ultimate consumer. The gasoline tax proceeds are used to provide Federal finances for highway support.

Petitioner's argument in the instant case adopted Martin's second major contention in toto to the effect that if the legal incidence of the tax should be on the producer rather than the consumer, sales made to consumers by one who is a producer-retailer, as is petitioner and as was Martin, should be distinguished from sales made by one who is simply a retailer, and sales by the producer-retailer should be exempt from sales tax. Martin

cited *Standard Oil vs. State*, Supra, and *Standard Oil Company vs. State Tax Commissioner*, Supra, as does petitioner. The Illinois Court disposed of this contention with the following reasoning which we believe valid and sound:

> In *Standard Oil Co. vs. State*, 283 Mich. 85, 276 N. W. 908 and *Standard Oil Co. vs. State Tax Commissioner*, 71 N. D. 146, 299 N. W. 447, Michigan and North Dakota adopted the position Martin would have us take. As expressed by the Supreme Court of Michigan the rationale of this position is that since the two taxes attach simultaneously, the Federal gasoline tax should not be considered a part of the sales price but as a fund which is payable by the producer to the Federal government.
>
> The Department's response is that if Martin's argument is accepted it would result in the Federal tax of four cents per gallon being included in the computation of the Illinois tax on sales by retailers who are not also producers and excluded in the case of producer-retailers. This would typically result in the cost of gasoline to a consumer who purchases from a non-producer retailer being greater than to one who purchases from a producer-retailer and would economically discriminate against non-producer retailers. It would violate, argues the Department, the Illinois constitution and the equal protection clause of the United States constitution.
>
> The retailers' occupation tax in Illinois is imposed on a retailer's "gross receipts" (Ill. Rev. Stat. 1969, Ch. 120, Par. 441). "Gross Receipts" are the "total selling price" or the "amount of such sales". (Ill. Rev. Stat. 1969, Ch. 120, Par. 440) "Selling price" or "amount of sale" is defined as the

> "consideration for a sale". (Ill. Rev. Stat. 1969, Ch. 120, Par. 440).
>
> The question therefore is whether when the producer-retailer passes on the cost to him of the Federal gasoline tax in the form of a higher price to the consumer, the amount by which the price is thus raised to compensate the producer-retailer can be said to be part of the consideration he receives upon the sale of the gasoline.
>
> . . . The legal incidence of the Federal gasoline tax is on the producer, who is under no legal duty to pass the burden of the tax on to the consumer. If he does pass on the burden of the tax it is simply done by charging the consumer a higher price. This higher price is the result of the added cost, because of the burden of the Federal tax, to the producer in selling his gasoline. It is not different from other costs he incurs in bringing his product to market, including the costs of raw material, its processing and its delivery. All these costs are includable in his "gross receipts," or the "consideration" he receives for his gasoline.
>
> No reason has been given by Martin why the cost of the gasoline tax should be regarded differently from the other costs of the producer-retailer and we perceive none.

In the very recent case of *Jerry M. Ferrara vs. Director, Division of Taxation*, Volume 2, Commerce Clearing House, Inc., New Jersey State Tax Reports, New Matters, Paragraphs 200-583, Division of Tax Appeals, March 8, 1973, it was held:

> N. J. S. A. 54:11B-3 (known as the Unincorporated Business Act.) imposes a tax on
>
> every individual or other unincorporated en-

> tity engaged in an unincorporated business an annual excise tax, measured by the gross receipts of such unincorporated business and allocated to the State as hereinafter provided at the rate of ¼ of 1%. . . .

The issue presented is whether the New Jersey Motor Fuels Tax of $0.06 per gallon and the Federal Excise Tax of $0.04 per gallon (as set forth in paragraphs 4 and 5 respectively of the aforesaid stipulation) should be included in the gross receipts of the retail gasoline dealer for the purpose of calculating taxes due under the N. J. Unincorporated Business Tax, N. J. S. A. 54:11B-1, et seq.

N. J. S. A. 54:11B-2(b) defines gross receipts to

> mean and include all receipts, of whatever kind and in whatever form, derived by an unincorporated business, without any deduction therefrom on account of any item of cost, expense, or loss, except that gross receipts shall not include the sales price of property returned by customers to the extent that the sales price thereof is refunded either in cash or in credit.

The Federal Gasoline Excise Tax levied by 26 U. S. C. A. Section 4081 of the Internal Revenue Code of 1954 (which was in effect during the year 1967) provides, in material part, as follows:

> There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ per gallon.

The New Jersey Motor Fuels Tax, N. J. S. A. 54:39-27, states in part:

> Every distributor shall . . . render a report to the commissioner stating the number of

> gallons of fuel sold or used in this State by him. . . . A tax of $0.06 per gallon on each gallon so reported shall be paid by each distributor. . . . If any distributor shall fail, neglect or refuse to file within the time prescribed by this section, the commissioner shall note such failure, neglect or refusal on his records, and shall estimate the sales distribution and use of said distributor, assessing the tax thereon, adding to said tax a penalty of 20% thereof for failure, neglect or refusal to report, and such estimate shall be prima facie evidence of the true amount of tax due to the commissioner for such distributor. . . .

The petitioner contends that for the State to include as "gross receipts" the State and Federal Excise tax is arbitrary, oppressive and illegal. The issue is further narrowed to the determination of upon whom the legislature and congress imposed the respective taxes. If the aforesaid excise taxes are imposed upon the consumer, and the retailer and distributor is merely a "collector" for the respective governments involved, then the excise taxes collected should not be included in the gross receipts.

However, if the taxes are imposed on the retailer or distributor, then the entire price paid by the ultimate consumer, including all excise taxes paid, should be included in the petitioner's "gross receipts."

Section 4081 of the Federal Excise Tax, Supra, provides that the tax is "imposed on gasoline sold on the *producer or importer* thereof" (Emphasis added).

Section 4082 defines a producer to include re-

finers, compounders, blenders and wholesale distributors.

The Federal statute clearly and unambiguously imposes the tax on the producer (which includes distributor) of the gasoline and not on the ultimate consumer. Liability for the payment of the tax rests solely upon the producer and nowhere is there any provision for any liability upon the ultimate consumer for the producer's failure to pay the tax.

The fact that the amount of the tax is added to the selling price and ultimately paid for the final purchaser does not constitute the latter as the taxpayer.

All taxes in effect are paid for by the ultimate consumer, but this does not mean that the consumer is personally liable for the tax or is the taxpayer.

All producers, manufacturers, distributors, and retailers are subjected to taxes of one form or another, including real estate and personal property taxes, which are calculated in their costs and added to the purchase price and "passed on" to the ultimate consumer. However, the words "passed on" are technically inaccurate in that the legal incidence of the aforesaid taxes are not on the consumer and he is not personally liable for the payment of said taxes.

In *Lash's Products Co. vs. United States*, 287 U. S. 175, 49 S.Ct. 100, the Court said:

> The phrase "passed the tax on" is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. . . . The purchaser does not pay the tax. He pays or

> may pay the seller more for the goods because of the seller's obligation, but that is all.

Petitioner, in addition, claims that since the excise taxes on gasoline amounted to approximately 40% of the wholesale cost of the product itself, the respondent cannot seriously contend that the retail dealer absorbs the taxes as a cost of doing business.

Petitioner also complains that the State is in effect attempting to levy a tax upon a tax, which is grossly unfair to the retailer, and also it is contrary to Federal Law. Petitioner may be correct in this contention, however, this Division cannot pass upon the fairness of any tax laws passed. In this respect, Petitioner's remedy lies with the New Jersey Legislature.

As to petitioner's contention that the tax is unlawful, it is well settled that this Division does not have the power to declare a statute unconstitutional.

Accordingly, it is the conclusion of this Division that the Federal Excise tax should be included in the gross receipts of the Petitioner.

The next question to be decided is whether the New Jersey Motor Fuels tax is paid by the distributor or by the ultimate user.

N. J. S. A. 54:39-27, Supra, clearly sets forth that the tax shall be reported and paid by each distributor and nowhere therein does it appear that there is any liability whatsoever upon the consumer.

The reasoning heretofore set forth in relation to the Federal Excise tax applies equally as well to

> the New Jersey Fuels tax and, therefore, I conclude that the New Jersey Motor Fuels tax is also imposed upon the retailer for the purpose of calculating taxes due under the New Jersey Unincorporated Business Tax.
>
> Judgment will be entered accordingly.

We respectfully submit that the majority rule to the effect that the incidence of the federal tax is upon the producer-distributor and not upon the retailer-consumer is accurate and that therefore the same is properly included within gross proceeds of sale for purposes of determining Mississippi sales tax liability. We further submit that this is true regardless of whether the person paying the federal tax is simply a producer under the federal definition or whether he is a producer-retailer such as Gurley.

Petitioner in his brief contends that the Mississippi excise tax on gasoline is a tax upon the consumer and not upon the seller and bases this argument on the case of *Panhandle Oil Co. vs. Miss. ex rel, Knox*, 277 U.S. 218 (1928) and dicta in the case of *State v. Republic Oil Co.*, 32 So. 2d 290 (1947). We submit that the *Panhandle* case has been overruled by the United States Supreme Court in the case of *State of Alabama vs. King and Boozer*, 314 U.S. 1, 86 L. Ed. 1, 62 S. Ct. 43, in which the Court held that, contrary to the result reached in *Panhandle*, a tax, the economic burden of which falls on the federal government, may constitutionally be imposed by a state.

We will review the Mississippi cases dealing with the gasoline tax act. The first case decided by the Mississippi Supreme Court and a case heavily relied upon to support the petitioner's position is the case of *State ex rel, Knox*

vs. Panhandle Oil Company (1927), 147 Miss. 663, 112 So. 584, 277 U.S. 218, 72 L. Ed. 218, 48 S. Ct. 451.

The applicable gasoline tax act at that time was Section 2, Chapter 115 of the Laws of 1924, as follows:

> *Privilege Tax on Gasoline:* Section 2
>
> Any person engaged in the business of distributor of gasoline, or retail dealer of gasoline, shall pay for the privilege of engaging in such business, an excise tax of three cents (3¢) per gallon *upon the sale of gasoline by SUCH dealer in this state* (italics supplied). . . .
>
> The Mississippi Court in construing this act said:
>
> It will be observed that the statute fixing the tax on the sale of gasoline, taxes the dealer for the privilege of engaging in the business of selling gasoline. It is, therefore, a privilege tax against the dealer for the right to carry on the business and is not a property tax; but the gallonage sold by the dealer is merely the measure of the tax to be charged the dealer for the privilege of carrying on the business of selling gasoline. . . .
>
> The Supreme Court of Mississippi said:
>
> . . . the tax is not attempted to be imposed on the gasoline while in the hands of the government, but it is charged against the dealer on each gallon of gasoline sold before the government purchases the gasoline; consequently, it is not a tax on the property or instrumentality of the government.
>
> The Court went on to say as follows:
>
> The Supreme Court of the United States has held

that the states are within their rights in taxing the privilege of carrying on businesses, and that the Federal Government is not entitled to have such tax annulled upon its purchases with which to operate its instrumentalities. *Metcalf vs. Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384; *Fidelity and Deposit Co. vs. Commonwealth of Pennsylvania*, 240 U. S. 319, 36 S. Ct. 298, 60 L. Ed. 664.

That the tax here in question is a privilege tax on the dealer and not a tax on the thing sold or a tax on the person who buys the commodity, was clearly decided by the Court in *Barataria Canning Co. vs. State*, 101 Miss. 890, 58 So. 769. In that case the Court held that the tax was not imposed on the thing sold, but was a tax to be paid by the person engaged in the business of packing or canning oysters in this state, or upon the local dealer selling or shipping the oysters, and that the tax was imposed as a privilege tax for conducting the business in this state, and that the amount of the tax was measured and fixed by the number of barrels of oysters sold by the dealer. We think the case is in point, and is decisive of the case at bar.

The case was appealed to the Supreme Court of the United States and was reversed by a split (4-3) decision, the majority opinion stating as follows:

> To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale.

In effect, the *Panhandle* case went off on the theory of measurement in fixing the incidence of the tax. However, in the dissenting opinion, Mr. Justice Holmes said:

> *If the Plaintiff in error had paid the tax and had added it to the price, the government would have had nothing to say.*

Shortly after the decision was handed down on May 14, 1928, the Mississippi Legislature amended the act, House Bill 472, Section 3, Regular Legislative Session of 1928, to impose the tax on distributors, etc., *when the product was received in the state for storage*, which has been THE language followed throughout the amendments to the act.

The Mississippi Supreme Court in construing the act in 1932 in the case of *City of Jackson vs. State ex rel. Mitchell, Atty. Gen.*, 156 Miss. 306, 126 So. 2 (1930), held that the tax is a privilege tax imposed upon the distributor or wholesaler-dealer.

The petitioner in this case relies heavily on the construction placed on the Gasoline Tax Act in the case of *State ex rel. Rice vs. Republic Oil Refining Co.*, 202 Miss. 688, 32 So. 2d 290 (1947). The question and point of law at bar was not before the Court in that case, and the language therein was pure dicta. The question before the Court in Republic, Supra, was whether the distributor was to be charged on the basis of invoices or the actual amount received within the state. The Court stated the question in the following language.

> The 677-062 gallons, the basis of this suit, were never received in Appellee's storage tanks and were not sold, distributed, used on the highways or in internal combustion engines, or for any other purpose, in Mississippi, and Appellee neither reported nor paid taxes thereon.

By way of dicta on page 293, the Court used the following language:

> The six cents a gallon tax is not upon Appellee or other distributors either at wholesale or retail, but is upon the ultimate consumer; is a use tax for the use of the public highways by the consumer and is not to be collected for uses other than upon the public highways. The retail dealer in selling to the consumer adds the six cents to that which would otherwise be the price of the gasoline provided the gasoline is to be used on the public highways, and the retailer remits the six cents to the State, which, in turn, reimburses the wholesaler, such as Appellee, who has already paid the tax in advance to the State.

Republic, Supra, is by no means controlling, since the language used was pure dictum and has never been recognized either by the State of Mississippi or the United States Government as construing the act insofar as the incidence of the tax is concerned.

In *City of Jackson vs. Wallace*, 196 So. 223 (1940), 189 Miss. 252, the Court said:

> Language beyond the litigation in which it is used is limited to the facts involved in the litigation, and all beyond that, necessary or proper for the construction of the particular subject matter before the Court, is mere "dictum" and not "decision".

In 1933, the Mississippi Supreme Court in the case of *Treas vs. Price*, 167 Miss. 121, 146 So. 630 (1933), said:

> One who sells or distributes, within the statute's definition thereof, gasoline to others is liable to

> the tax therefor without reference *to the use to which the purchaser or distributor puts the gasoline.* (italics supplied)

We next turn to the exact language of the Section of the statute under consideration, Section 10013-06, of the Mississippi Code of 1942. This statute was repealed effective January 1, 1970, and was replaced by Miss. Code Ann. Section 27-55-11 from and after that date. The original statute, which applied to the greater portion of the period in dispute here, reads in pertinent portions as follows:

> Any person engaged in the business as a distributor, or who acts as a distributor as defined in this act, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to and computed as follows:
>
> (a) Seven cents (7¢) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state, or received in this state for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any purpose. . . .

The incidence of the tax is further fixed in said act in the following language:

> The basis for determining the tax liability shall be the correct invoiced gallons, adjusted to 60 degrees F., at the refinery or point of origin of shipment.

The most recent decision dealing with the precise question involved here relative to the incidence of the Mississippi gasoline tax is *U. S. vs. Sharp, Motor Vehicle Comptroller*, 302 F. Supp. 668 (1969), which was a decision of

a three-judge constitutional court. In that case, the United States sought an adjudication of the three-judge court that the Mississippi Privilege Tax imposed on gasoline distributors was a tax upon the consumer of such gasoline and that, therefore, since the tax had been paid on gasoline purchased by the government, it was entitled to refund under its immunity from state taxation. Likewise involved was a charge of discriminatory application of exemptions of governmental entities from payment of the gasoline tax which is not pertinent here. Judge Dan Russell speaking for the panel disposed of this contention in the following language:

> . . .We do not quarrel with the contention that a statute's practical operation and effect determines where the legal incidence of the tax falls. We simply agree that the tax burden in the Mississippi statute falls plainly and squarely on the distributor, to whom the state looks for the payment of the tax, albeit the amount of the tax may ultimately be borne by the vendee, in this case the federal government.
>
> . . .Hence we find that Mississippi's gasoline tax is not such a tax to afford immunity to the plaintiff, except when it has received specific exemptions such as for gasoline used by the armed forces of the United States. As stipulated, this exemption has been in effect throughout the period of this claim and is now in effect by Section 10013-39 of the Mississippi statutes.
>
> In sum, the Court finds as a fact that the tax in suit at all times was levied and assessed against and collected by the State of Mississippi from a gasoline distributor, duly qualified under its laws, and never collected any such tax in suit (directly or indirectly) from the United States or any of its agencies; and that the defendant never discriminated against the Plaintiff in any manner in its administration of said privilege or excise tax law, according to the undisputed evidence and testimony in this case.

In *State of Louisiana vs. Atlas Pipeline Corporation*, 33 F. Supp. 160 (1940), the state tax collector was seeking to enforce a specific lien against a corporate debtor in bankruptcy, for Louisiana excise taxes which the corporation had allegedly collected from its customers, but had failed to pay to the state. Although the Court found there was no provision which would enable the state to effect a superior lien against the corporate assets, in construing a statute very similar to the one in issue here, the Court grounded its finding of duty to pay the tax on the state's right of recourse against the corporation, saying:

> . . .nowhere do I find any provision for a lien of any sort. On the contrary, the requirements, such as the giving of bond, making reports and penal provisions, were intended to prevent the loss of the tax through the obviously easy means of disposing of it or consuming the gasoline. The dealer is liable for the tax whether he collects an amount sufficient to cover it from those to whom he sells or not.

Petitioner relies upon decisions of other courts in his brief which hold that under their particular sales tax acts and under the express provisions of their respective gasoline tax laws, the state gasoline tax may not be included within gross proceed of sales for sales tax purposes. Each of these states and authorities cited turn upon the fact that the particular acts involved expressly require that the gasoline tax be passed on to the ultimate consumer. For example, in *State of Georgia vs. Thoni Oil*

Magic Benzol Gas Stations, Inc., Supra, the applicable provision of the Georgia law was as follows:

> It is the intention of the General Assembly that the consumer of motor fuel bear the burden of the taxes imposed by this chapter. No person who sells motor fuel in this state shall absorb the taxes imposed by this chapter on the motor fuel sold.

It is further provided that every person who sells at wholesale or at retail must state separately the amount of the tax from the price of the fuel in all advertising signs, price display signs, etc., and that the taxes are "added to the sales price."

See also the recent case of *Jerry M. Ferrara vs. Director, Division of Taxation* cited above as to the inclusion of the state gasoline excise tax as a part of the gross proceeds of sales in determining sales tax liability.

It is undisputed that mere economic incidence is not determinative of the question of legal incidence. In *Tax Review Board vs. Esso Standard Division*, 424 Pa 355, 277 A.2d 657, cert. denied, 389 U. S. 824, 88 S. Ct. 63, 19 L. Ed. 2d 79 1968), cited by petitioner, the Court said as follows:

> We agree that if the tax involved is truly a manufacturer's or producer's tax, the city's position is correct. We further agree that the mere fact that tax is passed on to the purchaser does not determine upon whom the tax is imposed. The economic burden of all taxes incident to the sale of merchandise is traditionally so passed on as part of the "overhead."

See also, *Lash's Products Co. vs. United States*, supra.

We therefore submit that the position of petitioner is not well taken and that there is no constitutional or legal bar to inclusion of Mississippi's excise tax on gasoline within gross proceeds of sale and collecting sales tax thereon. We further submit that the fact that petitioner has qualified as a distributor under the Mississippi act and pays the taxes pursuant to such qualification and is also a retailer of gasoline is immaterial. To allow Gurley, because he is both a distributor and retailer, to deduct state gasoline tax before computing his sales tax liability and to deny the right of such deduction to other distributors because they are not retailers of gasoline would be arbitrary and discriminatory and certainly would be inconsistent with the provisions of the Mississippi statute.

We therefore respectfully submit in view of the foregoing authorities and fallacies in the argument of petitioner that the incidence of the Mississippi gasoline tax is upon the distributor and not upon the consumer, and that the same is property includable in gross proceeds of sale for purposes of determining Mississippi sales tax liability.

POINT 3

STATE COURT DETERMINATIONS OF THE OPERATING INCIDENCE OF THEIR TAXING SCHEMES HAVE BEEN ACCEPTED AS CONTROLLING BY FEDERAL COURTS.

There is no doubt that the Mississippi Supreme Court has determined the operating incidences of the Federal and State gasoline excise taxes to fall on the producer/distributor; the Court so decided in the decision under attack here. Respondent respectfully submits that except where the issue of Federal immunity from taxation is raised,

there is equally little doubt that Federal Courts are bound by State Court determinations of the operating incidence of taxing schemes. Questions of construction of state statutes have always been within the province of State Supreme Courts, as is evidenced by the language of this Court in *Alabama vs. King and Boozer*, Supra, as follows:

> The taxing statute, as the Alabama Courts have held, makes the "purchaser", liable for the tax to the seller who is required "to add to the sales price" the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or credit. Who, in any particular transaction like the present, is a "purchaser" within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. (pp. 9-10)

In addition, the decision of the Supreme Court of the United States in the case of *Federal Land Bank of St. Paul vs. Bismarck Lumber Company*, 314 U. S. 95, 62 S. Ct. 1, 86 L. Ed. 65, is direct authority for the proposition that the determination of the highest Court of the state is controlling upon the question as to whether the legal incidence of a tax imposed by a law of that state is upon the vendor or the vendee. See also *United States vs. Sharp*, 302 F. Supp. 668 (S. D. Miss. 1969).

It is only when the question of federal immunity is raised that federal Courts may examine the taxing schemes to determine the operating incidence of the tax, as is evidenced by the following language from *Society for Savings, vs. Bowers*, 349 U. S. 143, 75 S. Ct. 607, 99 L. Ed. 950 (1955):

> Because the question here is whether the tax effects federal immunity, it is clear that *for this limited purpose* we are not bound by the State Court's characterization of the tax. (Emphasis added)

See also *Agricultural National Bank vs. State Tax Commission*, 392 U.S. 339, 88 S. Ct. 2173, 20 L. Ed.2d 1138 (1968). But it is apparent that even where the constitutional validity of the state's scheme is in question, Federal Courts are obligated to give State determinations great effect in their consideration. In *American Oil Company vs. Neill*, 380 U. S. 451, 85 S. Ct. 1130, 14 L. Ed.2d 1 (1965), the Court said:

> When a State Court has made its own definitive determination as to the operating incidence, our task is simplified. We give this finding great weight in determining the natural effect of the statute, and if it is consistent with the statute's reasonable interpretation, it will deemed conclusive.

Based on the clear intent of both the federal and state legislatures to impose this tax upon the producer/distributor, and the Mississippi Supreme Court decision that the legal incidence of the tax in fact falls upon the producer/distributor, the respondent respectfully submits that the petitioner's contentions to the contrary are unpersuasive, and that his Petition should be denied.

SUMMARY OF ARGUMENT

POINT 1

UNITED STATES AND MISSISSIPPI EXCISE TAXES ARE BY DEFINITION AND STATUTE IMPOSED ON THE DISTRIBUTOR NOT THE CONSUMER.

Excise taxes by definition are impost for licenses to pursue certain callings to exercise particular franchises

and to obtain certain privileges. *East Ohio Gas Company vs. Tax Commissioner of Ohio*, 43 F. 2d 170, 172 (DC Ohio 1930), *American Airways, Inc. vs. Wallace*, 57 F.2d 877, 880 (DC Tennessee 1932).

Both the language of the federal gasoline excise tax statute (Title 26, Chapter 32 *U. S. Code* Sections 4081, et seq.) and the legislative intent shown by the congressional record cited in *Martin Oil Service, Inc. vs. Illinois Department of Revenue*, 49 Ill.2d 262, 273 N. E.2d 823, Cert. denied 405 U. S. 923 (1971) clearly show that this tax is imposed on the distributor. Respondent submits that the *Martin* case is the most complete, definitive and persuasive statement of a State Supreme Court prior to the decision of the instant case.

Both the explicit language of the Mississippi gasoline excise statute, Section 27-55-11 of the Mississippi Code of 1972. and the testimony adduced in the trial court in this cause clearly show that tax liability attaches to the distributor at the time the gasoline enters Mississippi. The ultimate consumer has no liability to Mississippi to pay such tax and the distributor has no immunity or exception from the liability to pay such tax if the gasoline is lost or otherwise unsold.

Cases cited by Petitioner construing statutes which expressly provide for this tax to be passed along to the ultimate user obviously have no application of the Mississippi tax statute which has no such provision.

POINT 2

THE LEGAL INCIDENCE OF THE GASOLINE EXCISE TAX AS IMPOSED BY 26 U. S. C. SECTION 4081 AND MISS. CODE ANN. SECTION 27-55-11 (1972) HAS BEEN CONSTRUED BY FEDERAL AND STATE COURTS TO FALL ON THE DISTRIBUTOR.

A majority of the jurisdictions have concluded that the legal incidence of gasoline excise taxes is on the distributor and therefore includable in the base for sales tax. *Gurley vs. State Tax Commission*, 288 So. 2d 868 (Miss. 1974). *Sun Oil Company vs. Gross Income Tax Division*, 238 Ind. 111, 149 N. E.2d 115 (Ind. S. Ct.). *State of Georgia vs. Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S. E. 2d 224, affirmed by the Georgia Appellant Court in 226 Ga. 883, 178 S. E.2d 173. *Martin Oil Service, Inc. vs. Department of Revenue*, 49 Ill.2d 260, 273 N. E. 2d 823 (Ill. S. Ct., Sept. 30, 1971), Cert. denied by United States Supreme Court in docket number 71-845, February 22, 1972. *Pure Oil Company vs. State of Alabama*, 244 Ala. 258, 12 S.2d 861, 148 ALR 260.

The cases of *Standard Oil Company vs. State Tax Commissioner of North Dakota*, 71 N. D. 176, 299 N. W. 447, 135 ALR 1481, and *Standard Oil vs. State of Michigan*, 283 Mich. 85, 276 N. W. 908, cited by the petitioner for the proposition that the legal incidence of the federal tax fell on the purchaser, did not consider or determine the question of the legal incidence of the tax. In the case of *Tax Review Board vs. Esso Standard, Division of Humble Oil and Refining Company*, 424 Pa. 335, 227 A.2d 657, the Court relied on a reading of *Panhandle Oil vs. State of Mississippi ex rel. Knox*, 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857 (1928) and *Indian Motorcycle*

Company vs. United States, 283 U. S. 570 51 S. Ct. 601, 15 L. Ed. 1277 (1931), that was characterized as inaccurate by other federal Courts in *Dow Jones and Company vs. United States*, 128 F. Supp. 748 (1955) and *Martin's Auto Trimming, Inc. vs. Riddell*, 283 F. 2d 503 (1960).

The latest, soundest and most complete decision on the issues presented in this case is *Martin Oil Service, Inc. vs. Illinois Department of Revenue*, Supra, where the petitioner operated wholesale and retail outlets in Illinois and contended that the federal gasoline excise tax should not be included in his gross receipts subject to the Illinois Retailers' Occupation Tax. In finding that the legal incidence of the Illinois Occupation Tax was on the distributor, the Court emphasized the fact that unpaid excise tax could not be recovered from the consumer, the fact that the distributor was under no legal duty to pass the burden of the tax on to the consumer, and the fact that if a distinction should be recognized between an operator who is a producer-retailer and an operator who is merely a retailer, producer-retailers would be able to sell gasoline at a lower price than an operator who was a mere retailer.

See also *Jerry M. Ferrara vs. Director, Division of Taxation*, Volume 2, Commerce Clearing House, Inc.. New Jersey State Tax Reports, New Matters, Paragraphs 200-583, Division of Tax Appeals. March 8, 1973.

Petitioner bases his contention that the legal incidence of the Mississippi Gasoline Excise Tax falls on the consumer on the decision rendered in *Panhandle Oil Company vs. Mississippi ex rel. Knox*, Supra. That case was overruled by *Alabama vs. King and Boozer*, Supra, and was contrary to decisions of the Mississippi Supreme Court in

State ex rel Knox vs. Panhandle Oil Company, 147 Miss. 663, 112 So. 584 (1927) and *City of Jackson vs. State ex rel. Mitchell, Atty, General*, 156 Miss. 306, 126 So. 2 (1930). Petitioner also relies on dicta contained in Mississippi Supreme Court Decision *State ex rel. Rice vs. Republic Oil Refining Co.*, 202 Miss. 688, 32 So. 2d 290 (1947), which has never been recognized either by the State of Mississippi or the United States Government as construing the act insofar as the incidence of the tax is concerned, and is contrary to the reasoning contained in *Treas vs. Price*, 167 Miss. 121, 146 So. 630 (1933).

The most recent decision dealing with the incidence of the Mississippi gasoline tax is *United States vs. Sharp, Motor Vehicle Comptroller* 302 F. Supp. 668 (S. D. Miss. 1969), in which a three judge constitutional Court found that the ". . .tax burden in the Mississippi statute falls plainly and squarely on the distributor, . . ., and that ". . . Mississippi's gasoline tax is not such a tax to afford immunity to the Plaintiff, except when it has received specific exemptions such as for gasoline used by the Armed Forces of the United States."

And in a case considering a statute similar to the one in issue here, *State of Louisiana vs. Atlas Pipe Line Corporation*, 33 F. Supp. 160 (D. C. La. 1940), the Court recognized the legal duty of a corporate distributor to be responsible for the tax irrespective of its collection of the tax from the purchaser.

Decisions of other Courts on which petitioner relies involve gasoline excise statutes that require that the tax be passed on to the ultimate consumer. *State of Georgia vs. Thoni Oil Magic Benzol Gas Stations, Inc.*, Supra. See

also *Jerry M. Ferrara vs. Director, Division of Taxation*, Supra.

Mere economic incidence is not determinative of the question of legal incidence, *Tax Review Board vs. Esso Standard Division*, 424 Pa. 355, 277 A.2d 657, cert. denied, 389 U. S. 824, 88 S. Ct. 63, 19 L. Ed.2d 79 (1968). *Lash's Products Company vs. United States*, Supra. Respondent respectfully submits that there are no constitutional or legal bars to inclusion of the federal and Mississippi excise taxes within state sales tax base, and that further the fact that the petitioner has qualified as a distributor, and paid taxes pursuant to his qualification under the Federal and Mississippi Acts, precludes petitioner's argument that because he is a distributor and retailer, he is entitled to deduct gasoline excise taxes before computing his sales tax liability. Such preferred treatment would be arbitrary and discriminatory, and certainly inconsistent with the Mississippi statute.

POINT 3

STATE COURT DETERMINATIONS OF THE OPERATING INCIDENCE OF THEIR TAXING SCHEMES HAVE BEEN ACCEPTED AS CONTROLLING BY FEDERAL COURTS.

Questions of construction of state statutes lie within the exclusive province of State Supreme Courts, *Alabama vs. King and Boozer*, Supra, and determinations of the highest State Courts as to the incidence of a tax of that state is controlling on Federal Courts. *Federal Land Bank of St. Paul vs. Bismarck Lumber Co.*, 314 U. S. 95, 62 S. Ct. 1, 86 L. Ed. 65. *United States vs. Sharp*, Supra. It is only when the question of federal immunity is raised

that federal Courts may examine the state taxing schemes to determine the operating incidence, *Society for Savings* vs. *Bowers*, 349 U. S. 143, 75 S. Ct. 607, 99 L.Ed. 950 (1955), but even in those cases where a state Court has made its own definitive determination as to the operating incidence, that finding is given great weight and in the absence of blatent error, will be deemed conclusive. *American Oil Company vs. Neill*, 380 U. S. 451, 85 S. Ct. 1130, 14 L. Ed.2d 1 (1965).

CONCLUSION

In conclusion of the argument, Respondent would urge that the Petitioner has made no showing to the United States Supreme Court which would justify the granting of certiorari for the purpose of considering the Petitioner's arguments which were heard and rejected in the Mississippi Supreme Court. No question of Federal immunity exists here and no viable Federal constitutional question.

This Court and inferior Federal Courts have held on many occasions that the determination of a State Court as to the incidence of an item of State taxation should be accepted as final, at least if not blatently in error.

The early decisions of this Court and inferior Federal Courts would clearly support the determination that the incidence of the United States gasoline excise tax is upon the distributor and not the ultimate consumer, economic incidence being of no consequence by the overwhelming weight of authority. The language of both the United States and Mississippi statutes, the weight of the Congressional intent in adopting the Federal statute and the holdings of a majority of the State jurisdictions which

have addressed this question, all overwhelmingly support the Respondent's position and lend weight and authority to the decision of the Mississippi Supreme Court in this case.

For these reasons no substantial question of law requiring the attention of the United States Supreme Court has been raised and supported by the Petition in this cause. We therefore respectfully urge that certiorari be denied.

Respectfully submitted,

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI, RESPONDENT

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CERTIFICATE OF SERVICE

I, Hunter M. Gholson, one of the counsel for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of October, 1974, I served copies of the foregoing Response to the Petition for Writ of Certiorari to the Supreme Court for the United States on all parties required to be served, by depositing a copy of said Response in the United States Post Office properly addressed, with first class postage prepaid, to Mr. Walter P. Armstrong, Jr. and Hubert A. McBride, 15th Floor Commerce Title Building, Memphis, Tennessee 38103; and Charles R. Davis, David H. Nutt and Thomas W. Tardy, III, 507 First National Bank Building, Post Office Drawer 1532, Jackson, Mississippi 39205, Counsel for Petitioner.

HUNTER M. GHOLSON